United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1420

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA, :

Appellee, :

v. :

KENNETH RAYMOND CHIN, and ELIZABETH JANE YOUNG, now known as ELIZABETH JANE YOUNG CHIN, :

Defendants-Appellants. :

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P/S

On appeal from the United States District Court for the Eastern District of New York

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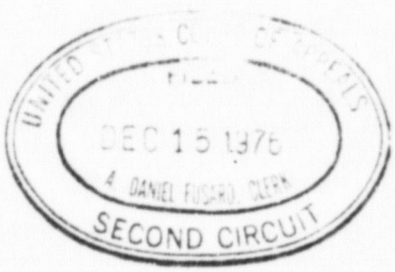
BRIEF FOR APPELLANT ELIZABETH JANE YOUNG CHIN



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BRIEF FOR APPELLANT ELIZABETH JANE YOUNG CHIN

PRELIMINARY STATEMENT

Defendant Elizabeth Jane Young Chin (hereinafter Young) was convicted after a jury trial before Judge Jacob Mishler along with her husband, co-defendant Kenneth Raymond Chin (hereinafter Chin)[1] on two counts of an eight count indictment charging violation of 18 U.S.C. §922(a)(3) and involving four weapons. That law proscribes, as part of the Omnibus Crime and Safe Streets Law of 1968, the transportation of a weapon into a

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1. Co-defendant Chin was convicted of two additional counts of the indictment under the same statute.

state where a person resides from outside the state.

Prior to sentencing the defendants (suspended sentence and probation) Judge Mishler dismissed count two of the indictmert against defendant Young and counts three and four against defendant Chin on motion under F.R.C.P. 29.

The case was launched by wide publicity. Pictures of both defendants were on the front page of the Daily News and a front page news story ran in The New York Times. The Secret Service was reported to have accused the defendants of threatening the life of the Emperor of Japan on a state visit to New York. After the arrest of defendants, however, the Secret Service withdrew from the case, and they both were charged with "technical" violations of the federal gun control law.

Ms. Young had been tried alone on a prior indictment under 18 U.S.C. §922(a)(3). That indictment had named both defendants and charged similar offenses involving the same four weapons joined in one conspiracy and one substantive count. At that trial, which took place between April 12, 1976 and April 16, 1976, a jury found Ms. Young not guilty of conspiring with Mr. Chin to transport the weapons from out of the state into a state where they resided. The jury could not agree on the substantive count.

On Monday, April 19, 1976, the government filed a superseding indictment against both defendants, dividing up what was previously one substantive count into eight separate

counts. After Ms. Young's acquittal on the conspiracy count, the government dropped the conspiracy count against Chin.

ISSUES PRESENTED

1. Whether the court below erred in denying defendants' motion to suppress evidence obtained by search warrant where the search warrant -- based on two affidavits, one public, the other sealed -- issued without probable cause:

(a) The public affidavit had insufficient information to establish the probability of the commission of any crime and, in all events, was time-barred because it rested upon stale information.

(b) The sealed affidavit, the contents of which were only partially revealed to defense counsel, rested upon admittedly false allegations about events too remote in time and too vague in character to connect defendants to any crime.

(c) Defendants were never able to fully controvert the validity of the sealed affidavit since its contents were never fully disclosed.

2. Whether as to defendant Young, a prior jury verdict of not guilty of conspiracy to violate a provision of the gun control law prohibiting transportation of weapons did not bar,

(a) on grounds of collateral estoppel, admission in a subsequent prosecution of evidence of joint criminal involvement with another (the co-defendant Chin) and other

specific issues necessarily decided by the prior acquittal, and/or

(b) on grounds of double jeopardy, a subsequent prosecution of the substantive charge predicated on the same evidence.

3. Whether the court below erred in barring and severely limiting testimony of defendant Young's father concerning defendant Young's state of mind when she moved from New York to California in July of 1975 -- this testimony bearing upon the issue of residency under the Omnibus Crime and Safe Streets Act of 1968 -- where the effect of such ruling deprived her of her defense under the law.

4. Whether the court below erred in charging the jury that residency as set forth in 18 U.S.C. §922(a)(3) means domicile where it can be shown that Congress, with opposite intention, referred to residence, only, in formulating the law.

5. Whether it was error to prevent defense counsel from showing in the course of the trial and arguing in summation that defendants' possession of weapons was for the purpose of hunting.

THE INDICTMENTS

Only Ms. Young was tried on the original indictment, the case against Chin having been severed on her motion prior to trial. That two-count indictment charged the two defendants with:

Count I: Conspiracy between July 29, 1975 and October 4, 1975 to obtain four firearms (a U.S. M-1 carbine, an AR 7 rifle, and two AR 180 rifles) in California and transporting them, in violation of 18 U.S.C. §922(a)(3), to Brooklyn, New York where they resided. The overt acts alleged in support of the conspiracy were (1) the purchase by Ms. Young on July 29, 1975, of a firearm (one of the two above described AR 180 rifles) in California, and (2) possession of all four of the above described firearms on October 4, 1975 by both defendants in their apartment in Brooklyn, New York.

Count II: From August 15, 1975 to October 4, 1975 the two defendants, both residing in Brooklyn, New York, illegally transported from California to New York the same four weapons described in Count I contrary to 18 U.S.C. §922(a)(3) (A-21-23).[2]

The superseding indictment specified the same four firearms described in the original indictment but divided the charges with respect to them into eight counts, all substantive, charging the two defendants jointly in each count with violating 18 U.S.C. §922(a)(3). Counts one, three, five and seven concerned the transportation by both defendants from California to New York of one AR 180 rifle, another AR 180 rifle, an AR 7 rifle, and an M-1 carbine respectively -- each weapon described

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2. "A-" followed by a number refers to pages in the Joint Appendix.

separately by serial number in each count. Counts two, four, six and eight charged the two defendants jointly with illegally receiving each of the four weapons, separately described seriatim in each count. The time period specified in each count varied slightly, but generally alleged the violations to have taken place in the same time period as in the original indictment, that is, between July and October, 1975 (A-31-35).

MOTIONS PRIOR TO TRIAL

Motion to Suppress

Defendants moved pursuant to F.R.C.P. 41 to suppress the four weapons described in the indictments on the grounds that such weapons had been seized in defendants' apartment on the authority of a search warrant that had been issued without probable cause in violation of the Fourth Amendment. A United States Magistrate had issued the search warrant on the basis of two affidavits of Neal Findley, a Special Agent of the United States Secret Service. One affidavit was publicly filed; the other was sealed. Upon defendants' motion a part, but not all, of the sealed affidavit of Agent Findley was revealed to defense counsel.

In the public affidavit Findley asserted that Ms. Young had purchased an AR 180 rifle in California on July 29, 1975, and had identified herself by way of a California driver's license which showed a Los Angeles address. Investigation by the Secret Service revealed that the Los Angeles address on the driver's

license had been changed to a New York address in 1974, the preceding year which, said Findley, constituted evidence of a violation of 18 U.S.C. §922(a)(6).[3] (A-12-14)

In the sealed affidavit, a different set of charges was set forth. There Findley asserted that "A search warrant is sought in connection with an investigation surrounding the official visit of Emperor Hirohito of Japan to the United States and to New York between October 4, 1975 and October 7, 1975." Findley then went on to allege that investigation revealed that Ms. Young in 1973 lived at the same street address in Los Angeles as did "one Joanne Miyamoto". Findley had learned this as a result of an examination of postal records and by separate independent examination.[4] The affidavit then went on to describe Ms. Miyamoto and one Mary Kochijama as members of the "Asian Americans for Action, a Japanese led organization, which . . . has . . . demonstrated against the United States-Japan Security Treaty" -- that Ms. Kochijama was "a contact for various extremist groups in New York City, including the Black Panther Party and the Black Liberation Army". This, said Findley -- the

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3. That section, §922(a)(6) proscribes the making of a false statement or a misrepresentation of a material fact in the purchase of a firearm. There was no statement in Findley's affidavit that Ms. Young had in fact made any false representation, cf. United States v. Mendoza, 487 F.2d 309 (5 Cir., 1973), infra.

4. When this fact was disputed by defendant Young, the government conceded that the assertion was false and that Ms. Young and Ms. Miyamoto lived at different addresses at that time (A-29-30) and that the postal records would have revealed such fact.

existence of the firearm described in the other affidavit and the involvement of Ms. Miyamoto and Ms. Kochijama -- "poses a serious threat to the personal safety of the Emperor of Japan and others during the official visit to the United States." (A-15-18) Nowhere in the four corners of either affidavit was it alleged that Ms. Young's politics or actions were such as would warrant suspicion in any way as to the security of the Emperor of Japan. She was connected tenuously to such suspicion because in 1973, it was alleged, she lived with a suspicious person.

After the issuance of the search warrant, its execution and the arrest of the defendants, there was never any other effort on the part of the government to connect either of the defendants to any threat to the safety of the Emperor of Japan; neither of them was charged with the violation of any crime referred to in the affidavits covered by 18 U.S.C. §922(a)(6) nor 18 U.S.C. §3056.

Defendants asserted that the affidavits failed to establish the commission of a crime. Possession of a firearm is, of itself, not a federal crime. The facts asserted concerning the obtaining of weapons in California were too remote in time (66 days) and place (3,000 miles) to support the likelihood that there were any weapons in the Brooklyn apartment where defendants were living on October 4, 1975. Material and admitted misrepresentations of fact were contained in the sealed affidavit. Even without those misrepresentations, the allegations were too vague to connect them with a crime. Finally, since there was never any

full disclosure of the contents of the sealed affidavit, defendants could not successfully meet whatever was secretly alleged. The government conceded that the only evidence before the magistrate was that contained in the two affidavits.

The court below denied the motion to suppress.

Motion to Dismiss the Superseding Indictment

After defendant Young was acquitted on the conspiracy count and upon her reindictment by superseding indictment jointly with defendant Chin on eight substantive counts which in essence realleged charges on which a jury had already ruled, defendant Young moved to dismiss the superseding indictment. She based the motion on a claim of double jeopardy and collateral estoppel. On the eve of the second trial, the court below denied the motion. An appeal to this Court on those grounds, filed before the second trial but perfected after the jury verdict of guilty in this case, was dismissed without prejudice to the raising of these issues on this appeal from the conviction.

FACTS BELOW

Although the government originally charged the defendants with threatening the life of the Emperor of Japan, the only evidence it adduced at any trial involving the defendants was the possession of four rifles adapted for hunting purposes and a number of licenses and application for licenses demonstrating their attempt to comply with local New York City and State requirements for the possession of weapons for hunting.

The government presented substantially the same case against defendants Young and Chin under the superseding indictment as it had presented against the defendant Young on the original indictment which had included a conspiracy count.

Defendant Young attempted to assert collateral estoppel on the issues on which there had already been a jury finding (her acquittal of conspiracy). That defense was rejected by the court (Trial II, 27, 116-118, 260, 434).[5] Defendant Young otherwise attempted to assert the same defense as in the first trial, i.e. that she was a resident of the State of California when she acquired any weapon involved and so legally transported such weapon to New York. At the second trial, the court severely limited her in adducing proof of her California residence. It permitted her father to testify only in conclusory terms -- not as the father had testified at the first trial when he said that Ms. Young and Chin (not yet then married) had had a quarrel in New York and that Ms. Young had left Chin to return to her parents in Hanford, California and to the State of California to live (Trial I, 340, 352, 361; Trial II, 498-500).

At the second trial, just as at the first, the government produced evidence that three of the four weapons described in the indictment: the AR 7 rifle, and two AR 180 rifles, were found in defendants' Brooklyn apartment on October 4, 1975, pursuant to the execution of a search warrant (Trial II, 94-101).

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5. Page numbers of the transcript of testimony at the first trial and at the second trial will be indicated as those of Trial I and those of Trial II.

A fourth weapon was found in a gun shop in upper New York State. The government then produced testimony of a sporting goods store salesman in Inglewood, California, again as at the first trial, that on July 29, 1975 he had sold an AR 180 rifle to Elizabeth Jane Young, that he had filled out a form required by the State of California (Exhibit 6, A-52-53) and that she had identified herself by way of a valid California driver's license (Trial II, 105, 106, 108-110). A similar form for a sale to a Marc Choyoi Kondo on August 12, 1975 by the same sporting goods store was produced to show that the second AR 180 rifle found in the defendants' Brooklyn apartment had been sold to Kondo in California (Trial II, 114, 120, 121, Exhibit 7).[6]

Another agent testified that Kondo's name and California address, as well as that of Mike Yanagita appeared in an address book seized in the defendants' apartment (Trial II, 192, 193).[7]

Again just as in the first trial various postal employees testified to change of address forms having been filed for each of the defendants from Los Angeles to New York in 1974, and finally to 925 Union Street in Brooklyn on August 30, 1974, and

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6. This testimony was objected to by defendant Young on the ground that all the evidence concerning this weapon had been stricken at the conclusion of the first trial of Ms. Young. The objection was overruled. (Trial II, 115, 116, 117)

7. This evidence had not been produced on the first trial. The government subpoenaed Kondo and Yanagita as witnesses but they refused to testify even though granted immunity. Judge Mishler held them both in contempt but that order was subsequently dismissed by Judge John Dooling, 418 F.Supp. 214.

that there were no change of address cards from the Brooklyn street address of the defendants from January 1, 1975 to the date of trial (Trial II, 196-202, 209-214, 225, 226).

An owner of a gun shop in upper New York State "in the heart of hunting country", Martin Benedicto, testified as he had at the first trial that he had first met the defendants on August 30, 1975 in his gun shop in Washingtonville, New York; that he had conversed with them on the subject of guns and hunting, and that they had, a week later, left an M-1 carbine with him for repair (Trial II, 246, 247, 253, 282, 290). Benedicto testified that the defendants had mentioned to him the name of Don Walls, their friend, a local resident who was a member of gun clubs. Ms. Young told Benedicto that she was looking for a 20 gauge shotgun, which she wanted for "all around shotgun use and hunting . . . small game, wild fowl, rabbits and squirrel" (Trial II, 288, 289, 290).[8]

Again just as at the first trial the landlord of 925 Union Street testified that rent had been paid every month from August, 1974 to the time of trial on the premises at 925 Union Street, Brooklyn rented to Kenneth R. Chin and Elizabeth Jane Young (Trial II, 312, 320, Exhibit 18). Similarly, a Gas Company

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8. Although the court permitted this cross-examination about hunting, it cautioned counsel repeatedly that whether or not the defendants were hunters was completely irrelevant to the case (Trial II, 68, 287). The record is nonetheless filled with references properly in evidence adduced by prosecution and defendants of the fact that defendants were hunters (Trial II, 129, 288, 289, 373, 376, 378, 423, 425, 427).

representative, a Con Ed service representative, and a Telephone Company representative testified that Con Ed, gas and telephone bills were paid regularly throughout the same period -- and that the record name on the bills was Elizabeth Young (Trial II, 400, 402, 405, 325, 335, 347, 393, 396).

The defendant produced witnesses to show that while Kenneth Chin remained in New York throughout July and August, 1975, Ms. Young went back to California where she had formerly lived and where her parents lived (Trial II, 448, 451, 461, 468, 498, 503, 530). Charles Young, the defendant's father, had originally testified at the first trial that his daughter had returned to California on a one-way ticket because "she's breaking up with Kenny and she wants to work in California" -- and further that she had signed up for unemployment insurance in California (Trial I, 340, 352). When Mr. Young appeared at the second trial, the court did not permit him to again testify to these facts, urged by defendant Young to show her state of mind when she left New York. Instead the court permitted Mr. Young to testify only to the conclusion without giving any reason therefor -- "she had come to California to establish her residence" (Trial II, 499-503).

THE CHARGE

The court cited the purpose of Congress in passing the Federal Gun Control Act of 1968 (A-87), but specifically left out any mention of Congress's expressed desire not to "place

any unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity". (See 101 Pub.L. 90-618, p. 235 pocket part United States Code Annotated.) (Trial II, 781; A-87)

Despite objection, the court instructed the jury that "Residence as used in the statute is defined in legal terms as domicile" (Trial II, 797, A-102; 817, A-123).

The court further instructed the jury over objection that it could infer from the fact of the possession of the weapons by the defendants in October, 1975 "that the accused [meaning both defendants] participated in the unlawful transportation of the weapons" (Trial II, 793, 794; A-98, A-99). This in effect was a directed verdict of "guilty".

POINT I

THE COURT BELOW FAILED TO FOLLOW CONSTITUTIONAL STANDARDS UNDER THE FOURTH AMENDMENT WHEN IT DENIED DEFENDANTS' MOTION TO SUPPRESS THE FRUITS OF AN ILLEGAL SEARCH IN THE ABSENCE OF ANY SHOWING OF PROBABLE CAUSE FOR THE SEARCH WARRANT.

The warrant issued on the basis of two affidavits -- one public, the other never completely revealed to defense counsel, but, insofar as revealed, still inadequate to supply the essential ingredients of probable cause.

Defendant Young argued below the insufficiency of both

affidavits, asserting that the affidavic supporting a search warrant must set forth facts, as distinguished from suspicion, to warrant a logical inference that contraband is at the location sought to be searched.

The afterfound assertedly alleged contraband[9] cannot justify an illegal seizure. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Coolidge v. New Hampshire, 403 U.S. 443, 454, 455 (1971).

The distinction between fact and suspicion is developed at length in Nathanson v. United States, 290 U.S. 41, 47 (1933), Aguilar v. Texas, 378 U.S. 108 (1964), and in Spinelli v. United States, 393 U.S. 410 (1969).

No Personal Knowledge Asserted Concerning Location of Contraband

In the case at bar there was no evidence, hearsay or otherwise, which tended to show that anyone including Agent Findley saw or knew that firearms of any kind were located in the Union Street, Brooklyn apartment. The magistrate was asked to make an inference based upon the alleged purchase of a firearm in California in July, 1975, that the firearm was thereafter transported to New York and was placed in the apartment where defendant Young resided and that the firearm remained there in October, 1975, in the absence of any other evidence that the

9. Defendants contended throughout that the rifles involved were legitimate hunting weapons and were not contraband of any kind.

firearm was, in fact, in the Brooklyn apartment. Cf. United States v. Harris, 403 U.S. 573 (1971); Whiteley v. Warden, 401 U.S. 560, 567 (1971); United States ex rel. Laurence Metze v. New York, 303 F.Supp. 1359 (SDNY, 1969); United States v. Burke, 517 F.2d 377 (2 Cir. 1975).

The only direct reference to the rifle concerned its purchase three thousand miles from Brooklyn in California 66 days before the search warrant application. Moreover, the facts surrounding the purchase indicated that the correct address of the purchaser was readily and publicly available to any person checking postal records. There was no logical or direct inference which could legally be made that the purchase of readily moveable personal property three thousand miles from Brooklyn, in California, would lead to the probability that such property would be found in such purchaser's Brooklyn residence more than two months later.

Time Lapse Invalidated Information

In Sgro v. United States, 287 U.S. 206, 210 (1932) the Court suppressed the evidence where the lapse of time was only 21 days. Said the Court there:

> "[I]t is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time."

In Durham v. United States, 403 F.2d 190, 193, 194 (9 Cir., 1968) the court set forth standards for a requisite showing that probable cause exists to search a given place where the allegations concern events remote in time to such place:

> "The most convincing proof that the property was in the possession of the person or upon the premises at some remote time in the past will not justify a present invasion of privacy.
>
> . . . . .
>
> "A showing to the effect that the property to be seized was at the place to be searched a substantial time before the application is made does not justify the issuance of a search warrant, for the reason that during the intervening period the property may have been moved away. The facts must show that the property to be seized was known to be at the place to be searched so recently as to justify the belief that the property is still there at the time of the issuance of the search warrant."

No probable cause has been held to exist because of remoteness, and the search warrant was held invalid, in Schoeneman v. United States, 317 F.2d 173 (C.A. D.C., 1963) (3-1/2 months, unreasonable); Siden v. United States, 9 F.2d 241 (8th Cir., 1925), modified on other grounds, 14 F.2d 846 (12 days, unreasonable); Dandrea v. United States, 7 F.2d 861 (8th Cir., 1925) (42 days, unreasonable); United States v. Van Ert, 350 F.Supp. 1339 (E.D. Wis., 1972) (55 days, unreasonable); United States v. Nichols, 89 F.Supp. 953 (W.D.Ark., 1950) (21 days, unreasonable); cf. United States v. Boyd, 422 F.2d 791 (6th Cir., 1970); United States v. Bosch, 209 F.Supp. 15 (E.D. Mich., 1962).

In the above cases, where defense counsel raised the issue of timeliness or remoteness, the affidavits involved set forth allegations that the property was at the premises in question at some previous time. The ripeness of staleness of the affidavit was then measured from the time of that occurrence

to the date of execution of the affidavit. In the case at bar, however, at no time mentioned in the affidavit was the rifle alleged to have been in Brooklyn at the premises to be searched.

No Crime Alleged

While the affidavit in order to be sufficient must contain facts relating "to the commission of a crime on the premises to be searched", United States v. Ramirez, 279 F.2d at 712, 715 (2 Cir., 1960), the present affidavits failed to allege any facts constituting a crime anywhere. It is merely alleged that Ms. Young bought a firearm in California with a driver's license, apparently bearing her true name, but having a California address, when she had already moved from California to New York. As a matter of law these facts do not constitute a federal crime as purportedly alleged by Agent Findley. The grand jury appropriately did not indict Ms. Young or defendant Chin for the crime of purchasing a firearm with false identification (18 U.S.C. §922(a)(6)).

In United States v. Mendoza, 487 F.2d 309 (5th Cir., 1973) the defendant had purchased a firearm in Texas with a driver's license bearing his own name and a Texas address when, in fact, it was shown that he resided in Mexico. The Fifth Circuit reversed his conviction, holding that as a matter of law such facts standing alone do not prove false identification and cannot constitute a violation of 18 U.S.C. §922(a)(6). Under the logic of this case, it is clear that no facts supporting a crime were alleged in either of Agent Findley's affidavits.

In summary, the allegations in the public affidavit fail for three reasons: (1) The time concerning the purchase of the rifle in California (more than two months before) was not recently connected with any observations concerning that rifle; (2) There was no allegation from which a reasonable inference can be drawn that the rifle was presently or ever located at the Union Street, Brooklyn address. In United States v. Ramirez, supra, this Court said:

> "[A]n affidavit is insufficient if the affirmations of fact bear no logical relevance to the commission of a crime on the premises to be searched."

Cf. United States v. Harris, 403 U.S. 573, 579 (1971). Any allegation that the rifle was at the Union Street premises was based upon surmise or suspicion only; (3) No federal crime of any kind was set forth under the facts of Agent Findley's affidavits.

Since the court could consider only the information brought to the magistrate's attention in that affidavit [Giordenello v. United States, 357 U.S. 480, 486 (1958); Aguilar v. Texas, supra], the affidavits read together do not pass constitutional muster under the Fourth Amendment for the issuance of the warrant.

Misstatements Invalidated Warrant

This Court has suggested in United States v. Gonzalez, 488 F.2d 833, 837, 838 (2 Cir., 1973) that material and knowing misstatements -- as, for example, those in the present indictment cited supra, page 7, note 4 -- in an affidavit supporting a warrant

invalidate the warrant -- a negligent misstatement would upset a warrant only if the misstatement was material. See United States v. Bozza, 365 F.2d 206, 223-224 (2 Cir., 1966); United States v. Pond, 523 F.2d 210 (2 Cir., 1975). Cf. United States ex rel. Cubicutti v. Vincent, 383 F.Supp. 662 (SDNY 1974); Ruggendorf v. United States, 376 U.S. 528, 531, 532 (1964).

This Court in Pond reaffirmed dicta in Gonzalez that "a misrepresentation which is either intentional or material if contained in a search warrant affidavit requires reversal". Cf. United States v. Seijo, 514 F.2d 1357 (2 Cir., 1975).

United States v. Perry, 380 F.2d 356, 358 (2 Cir., 1967) cert. den. 389 U.S. 943; United States v. Sulton, 463 F.2d 1066, 1070 (2 Cir., 1972); United States v. Hunt, 496 F.2d 888, 894 (5 Cir., 1974) (false statements even if not material can "eviscerate the existence of probable cause"); United States v. Thomas, 489 F.2d 664 (5 Cir., 1973); United States v. Damitz, 495 F.2d 50 (9 Cir. 1974); United States v. Belculfine, 508 F.2d 58, 60-63 (1 Cir. 1974); United States v. Prewitt, 534 F.2d 200, 202 (9 Cir. 1976).

No Adequate Connection to Threat to Emperor

Thus there was no probable cause that any firearm was located at the Brooklyn address made out by either affidavit. Particularly, there was no appropriate connection whatever made in either affidavit of the defendants to the alleged danger to the Emperor of Japan -- an additional reason for invalidating

the warrant -- one which raises, along with the falsehoods in the public affidavit, the issue of the good faith of the prosecution.

There is no allegation in the four corners of the affidavits that defendant Young or defendant Chin were members of any illegal or subversive group of any kind. The attempt was made to inculpate the defendants by their association with others. Guilt by such association is not recognized by this Court. See United States v. Cohen, 489 F.2d 945, 948 (2 Cir., 1973); United States v. Fantuzzi, 463 F.2d 683, 690 (2 Cir., 1972); United States v. Kompinski, 373 F.2d 429, 434 (2 Cir., 1967).

Assuming, arguendo that either Joanne Miyamoto or Mary Kochiyama were such members and constituted in some manner a threat to the Emperor, the only connection made between them and the defendants was that at some time in 1973 (two years before 1975) defendant Young shared an apartment with Joanne Miyamoto.[10] On the face of it, thus, it would appear that the government sought a search warrant in bad faith relying on the inflammatory nature of the accusation rather than evidence of any kind.

Court's Opinion

The court below failed to meet defendants' challenge to the adequacy of probable cause. First discussing the disclosed portions of the supplemental affidavit which concern the alleged threat to the life of the Emperor of Japan, the court

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10. This asserted fact is now admitted by the government to be false (A-29-30).

merely recited the allegations which connect Joanne Miyamoto and Mary Kochiyama to various extremist groups and the like, and failed to note how the threat of these two women to the personal safety of the Emperor of Japan was in any way connected to the defendants. The tenuous connection to the Emperor of Japan made in the affidavit involved a claim, later withdrawn as false and/or mistaken by the government, that in 1973 defendant Young lived with Ms. Miyamoto in Los Angeles, California (See A-29-30). The court abdicated its judicial function when it commented on the record facts:

> ". . . the search for the aforementioned semi-automatic rifle is said to be related to the threat thus posed." (A-39)

The court discussed separately the defendants' contention that a fair reading of Findley's public affidavit established no crime whatsoever. That affidavit asserted that the purchase of the weapon in July, 1975 in California by Ms. Young and her identification of herself by means of a California driver's license plus the fact that she had previously (in August, 1974) notified the Post Office of a change of address to New York and that her name was on the mail box at 925 Union Street, Brooklyn, New York, was sufficient to establish probable cause for violation of 18 U.S.C. §922(a)(6).

The facts asserted in the affidavit did not establish any such violation as argued below and ruled on by the Fifth Circuit in United States v. Mendoza, supra. So instead the court below stated again arbitrarily that there was a basis for the

magistrate's finding of a violation of 18 U.S.C. §922(a)(3) (not the section of the law assertedly violated in the affidavit). The court conveniently ignored that the only claim in the affidavit was a violation of 18 U.S.C. §922(a)(6). Subdivision (6) deals with misrepresentation not transportation or receipt into a state from another place. In support of the validity of the affidavit, the court cited United States v. Weatherford, 471 F.2d 47, 49 (7 Cir., 1972), cert. den. 411 U.S. 972 (A-40). Weatherford, however, is inapposite. It concerns an interpretation of 18 U.S.C. §922(g)(1) where the transportation of firearms in interstate commerce by convicted felons is prohibited and where the affidavit set forth facts which gave rise to reasonable inferences that the crime was being committed. Moreover, even if one were to extend the imagination and the sequiturs to the extent of assuming, arguendo, that there were sufficient facts to show a violation of 18 U.S.C. §922(a)(3), there was no present violation of that law even if one assumed that the weapon was in the Union Street premises. The law requires for the issuance of the warrant that the belief be expressed that:

> "the law was being violated on the premises to be searched." Dumbra v. United States, 268 U.S. 435, 441 (1925).

The presence of the rifle in the premises was not evidence of illegal transport.

The court below also stated that a "likely place for concealment of a semi-automatic rifle would be the owner's house"

(A-40). This statement completely overlooked three factors: (1) concealment of the weapon was no crime; (2) the likelihood of its being in the defendant's home required an assumption that it was transported from where it was last noticed in California, 3,000 miles away, to defendant's home in New York, and (3) a time period of 66 days had elapsed between the time of purchase and the application for the search warrant. The cases cited by the court in support of "the nexus between the purchase of the gun and its presence" are inapposite. Each of them involved the recent commission of a serious common law crime and facts which would support the inference that the tools of the crime were in the accused's home. United States v. Steeves, 525 F.2d 33 (8 Cir., 1975) (recent robbery of a bank located in same city as defendant's home); United States v. Rahn, 511 F.2d 290 (10 Cir., 1975), cert. den. 44 U.S.L.W. 3201 (theft of firearms); United States v. Mulligan, 488 F.2d 732 (9 Cir., 1973), cert. den. 417 U.S. 930 (1974) (burglary); United States v. Lucarz, 430 F.2d 1051 (9 Cir., 1970) (recent theft).

The court below summarily dismissed defendants' argument concerning the time lapse of 66 days which, combined with the 3,000 mile distance from California, made it unlikely rather than likely that the rifle would be found in New York. Similarly, the court dismissed completely the serious misstatement in the supplemental affidavit. It was by the misstatement alone that any connection whatsoever was supposedly shown to the persons who were alleged to be a threat to the Emperor of Japan. The magistrate

must have considered this prejudicial false statement, and the misrepresentation alone gave rise to what should have been the court's action -- suppression of the fruits of the illegal search.

POINT II

UNDER THE DOCTRINE OF DOUBLE JEOPARDY THE PRIOR ACQUITAL OF DEFENDANT YOUNG OF CONSPIRACY BARRED UNDER CONSIDERATIONS OF COLLATERAL ESTOPPEL REINTRODUCTION OF SIMILAR EVIDENCE ON ISSUES ALREADY DECIDED AND IN FACT BARRED THE SECOND PROSECUTION BASED AS IT WAS ON THE SAME EVIDENCE.

A. The Jury Verdict of Not Guilty of Conspiracy to Violate 18 U.S.C. §922(a)(3) as a Co-conspirator with Co-defendant Chin, Necessarily Decided Fact Issues Favorably to Defendant Young. The Government is Thereafter Barred by the Doctrine of Collateral Estoppel from Relitigating any of these Issues in a Subsequent Prosecution of that Defendant.

When the jury found the defendant Young not guilty of conspiring with Kenneth Chin between July 29, 1975 and October 4, 1975 to violate the weapons law, the jury expressly had to find that the two defendants had no agreement whatsoever that concerned the illegal transportation of weapons. This was impliedly a finding that neither one nor the other had aided or abetted the other in violating the weapons law.[11]

11. Indeed, in its brief below, the government stated:
"It may well have been (in fact it is more likely than not, it is submitted) that the jury's verdict was based on the Government's failure to prove beyond a reasonable doubt an agreement between Young and her co-defendant." (p. 13)
And again:
". . . it is not unreasonable at all to assume that the jury acquitted on Count One because they were not convinced that an agreement had existed . . . " (p. 15)

Since at the first trial defendant Young presented affirmative evidence that she quarreled with defendant Chin, returned to her parents' home in Hanford, California on a one-way airplane ticket, looked for work and registered to receive unemployment assistance, the jury must have found that those facts were true and accordingly that the defendant Young had at least temporarily broken up her close relationship with defendant Chin.

These favorable inferences must have been drawn by a jury as against the uncontroverted evidence that defendant Young purchased one of the weapons in California on July 29, 1975 and that the weapon and two others were found in an apartment in New York exclusively occupied by defendants Chin and Young on October 4, 1975.

Since all these inferences, and more, were favorable to defendant Young she could not be required to face a retrial in which she had to prove again that she had not acted in concert with defendant Chin to violate the weapons law. As stated in Ashe v. Swenson, 397 U.S. 436, 443 (1970):

> "It [Collateral Estoppel] means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future law suit."

Instead at the trial, having pleaded double jeopardy and collateral estoppel, she tried a second time to introduce the same evidence of her break with defendant Chin and at the second trial the court ruled that she could not even assert this defense this time around (Trial II, 499-503). Thus, not only did

she not get the advantage of the prior favorable ruling, but she was precluded from presenting all the facts to the jury and the jury was permitted to make a finding that defendants Young and Chin knowingly (and together) wilfully transported the weapons from California to New York in violation of the weapons law.

The Ninth Circuit in a case involving a reverse application of the doctrine of collateral estoppel, United States v. Colacurcio, 514 F.2d 1, 6 (9 Cir. 1975), defined the doctrine by reference to 1B Moore's Federal Practice:

> "The issue to be concluded must be the same as that involved in the prior action. In the prior action, the issue must have been raised and litigated, and actually adjudged. The issue must have been material and relevant to the disposition of the prior action. The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment." (Emphasis supplied.)

This Court had occasion to apply the doctrine of collateral estoppel to a set of facts which highlighted the distinction between res judicata, collateral estoppel and broad double jeopardy considerations in United States v. Kramer, 289 F.2d 909 (2 Cir. 1961).

In Kramer, the defendant had been acquitted of substantive crimes arising from two post office burglaries. The new indictment charged conspiracy to break and enter with intent to commit larceny and conspiracy to conceal and convert money and things of value stolen from the Post Office. Another count charged Kramer with receiving and concealing property from the Post Office.

Judge Friendly, speaking for this Court, held that the Double Jeopardy clause did not preclude a subsequent prosecution on issues not raised in the prior criminal proceeding, but collateral estoppel precluded the government from relitigating issues necessarily determined in the earlier trial.

The test as to how collateral estoppel or res judicata applies to a subsequent prosecution in a criminal case is there broken down into two phases:

(1) What did the first judgment determine? (to be ascertained by looking to the record of the prior trial), and

(2) How does that determination bear on the second case?

Said this Court in Kramer at pp. 915, 916:

> "A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue.
>
> . . . . . .
>
> "More important, to permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment . . . and still longer before the proliferation of statutory offenses deprived it of so much of its effect.
>
> . . . . . .

"The very nub of collateral estoppel is to extend res judicata beyond those cases where the prior judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment, see United States v. Sabella, 2 Cir 1959, 272 F.2d 206, 211, to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charges by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be."

Thus based upon the analysis in Kramer and viewed narrowly, the government in the case at bar was precluded from presenting to the jury at the second trial any issue which the jury expressedly or impliedly considered and decided when it found the defendant Young not guilty of the charge in Count I of the indictment which read:

COUNT I

On or about and between July 29, 1975 and October 4, 1975 within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, did knowingly and wilfully conspire to commit an offense against the United States, namely, to obtain firearms in Los Angeles, California, to wit: a U.S. M1 carbine, Serial Number 5487136; an Armalite AR 7 rifle, Serial Number 89474; an Armalite 180 rifle, Serial Number 12585; and to transport said firearms from Los Angeles, California into Brooklyn, New York, the State where the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG did then reside, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG not being licensed importers, manufacturers, dealers, or collectors, of said firearms, in violation of Title 18 United States Code, Section 922(a)(3).

In furtherance of said unlawful conspiracy and to further the objects thereof, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG did commit the following:

OVERT ACTS

1. On or about July 29, 1975, the defendant ELIZABETH JANE YOUNG purchased a firearm, Serial Number S-12585 from Coles Sporting Goods, 1030 South La Brea Street, Inglewood, California.

2. On or about October 4, 1975, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, did possess at 925 Union Street, Brooklyn, New York, Apartment 4B, four (4) firearms, Serial Numbers 5487136, 89474, S-12585, (Title 18 United States Code, Section 371).

From a reading of the foregoing, it is clear that the jury found that there was no unlawful conspiracy between defendants Chin and Young of any kind whatsoever. Thus, evidence as to the two overt acts which included the purchase of a rifle by defendant Young in California on July 29, 1975 and the possession of three rifles on October 4, 1975 in the defendant's apartment in Brooklyn, New York could not be shown again to reflect any unlawful conspiracy or action in concert by the two defendants to do or to have done anything illegal with those weapons.

Any suggestion to a new jury that there was an unlawful agreement between the two of them or that one or the other aided or abetted the other of the two, was legally barred by the doctrine of res judicata and collateral estoppel.

Similarly, since the jury must have found the absence of an agreement between the defendants to be based on the evidence of a quarrel between them and, further, evidence that the defendant Young changed her residence from New York to California, the issue of the quarrel and its significance (change of residence) cannot again be put to a new jury because of res judicata and collateral estoppel.

Thus, if defendant Young could be retried at all on any of the issues in the new indictment, the court would have to take from the jury any considerations which suggested joint illegal action of the defendants, or any considerations that defendant Young had not had a bona fide intent to change her residence from New York to California. In this regard, it was further improper for the evidence as to her (and his) continuing residence in New York through 1974 and 1975 to be presented where another jury had heard it and decided that, at least during that period and in July and August 1975, she had changed her residence sufficiently for it to signify a break in relationship with defendant Chin.

This Court may well ask: what was left to be adjudicated? As is set forth in "B." infra, defendant Young asserts that there could be no retrial on the issues involved after her prior acquittal.

B. The Prosecution was Barred by Double Jeopardy from Trying Defendant Young under the Superseding Indictment because both the Conspiracy Trial (where Defendant was acquitted) and the Second Trial on the Substantive Crime Involved the Same Evidence.

In this particular case, the government's theory and evidence on both the conspiracy count and the substantive crime of violation of 18 U.S.C. §922 (a)(3), were the same.

The evidence adduced by the government at both trials was identical on the issues tendered. At the second trial, additional and cumulative evidence was presented on the issue of defendant Young's continuing residence in New York (Gas Company,

Con Edison and Telephone Company computer read-outs indicating that the service at 925 Union Street, Brooklyn, New York was continuously in the name of Elizabeth Young from 1974 to the present). Other similar evidence as to the lease and post office change of address forms had been introduced at the first trial and was reintroduced at the second trial.

Under standards set forth by this Court in Kramer, the case at bar met the "same evidence" test, i.e.:

> "Offenses are not the same for purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct: they are the 'same' only when 'the evidence to support a conviction upon one of them [the indictments]' would have been sufficient to warrant a conviction upon the other [citing cases]." at p. 913

The real theory of the government in this prosecution was that the two defendants while continuously residing in Brooklyn, New York, conspired and agreed to go together (or for one of them to go on behalf of both) to California for the purpose of obtaining weapons and bringing them into New York where they lived. This was the theory of the prosecution at both trials and was reflected in the court's charge to the jury, of which the following are excerpts which show how inextricably the court connected defendant Young with defendant Chin:

> "On the other hand, if you find this situation, that the defendant Young was a resident of California at the time she transported a weapon into the State of New York -- and I make no finding that she transported any weapon into the State of New York -- that's for you to determine and you must determine whether the Government proved that beyond

a reasonable doubt -- but assuming that you find that she transported a weapon into the State of New York and at that time she was a resident of California but at that time the defendant Chin was a resident of the State of New York and that he aided and abetted -- as I will define that later -- the transportation into the State of New York and that he received a weapon while he was a resident of the State of New York that was transported from outside the State, then the mere fact that you must find the defendant Young not guilty by reason of failure to prove residence does not exculpate Mr. Chin because he doesn't benefit by her non-residence.

"In order to prove the accused guilty of counts 1, 3, 5 and 7, which are the counts charging transportation by a resident of the State of New York, the following essential elements of crime must be proven:

"One, that the accused, at the times mentioned, was not a licensed importer, manufacturer, dealer or collector of firearms;

"Two, that on or about the dates alleged the defendant purchased or otherwise obtained a firearm described in the particular count of the indictment;

"Three, that on or about the dates alleged the defendant knowingly transported the firearm into the State of New York, and,

"Four, that at the time the defendant transported the firearm into the State of New York, the defendant was a resident of the State of New York.

"The Government must prove all those four elements by proof beyond a reasonable doubt.

"Now, thus far, I have not yet touched on the proof in the record or the lack of proof in the record and I will say now there is no proof in the record that the defendant Chin transported any weapon into the State of New York.

"The proof is clear in the record that he was not in California. However, I will come to the aiding and abetting statute and you will consider whether he violated Section 2, which, I repeated

eight times and that is the aiding and abetting statute.

". . . Section 2 of Title 18 . . . provides this:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

"(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

"So, the defendant Chin here is charged with aiding and abetting the transportation of the weapon or weapons.

"In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture and willfully participate in it as he would if it were something he wished to bring about. In other words, that he do it knowingly and voluntarily and not by pure accident.

"An act is willfully done voluntarily and intentionally and with specific intent to do that which the law forbids.

"Of course, you may not find an accused guilty of aiding and abetting the commission of a crime unless you find that the crime was committed, that all the essential elements of the crime were established.

"The law recognizes also that possession may be sole or joint. . . .

"But for these purposes it doesn't matter as to the type of possession. If you find from the evidence in this case beyond a reasonable doubt that the weapons made the subject of the counts in this indictment were in the knowing possession of the defendants and you find that the particular weapon -- referring to the ones described in the counts -- the four weapons described in the eight counts of the indictment -- if you find that the weapons were

brought into the State of New York from outside the State of New York, then you may infer from your finding of possession that the accused participated in the unlawful transportation." (emphasis supplied) (Trial II, 783, 784, 793, 794; A-89-90, 98, 99)

In so instructing the jury, the court below permitted the jury to find defendant Young guilty through her association with Chin. The jury could find Chin guilty as an aider and abetter even if it found that Young was a resident of California. Then (with some degree of inconsistency), the jury was told that Chin could not be found guilty unless a crime had been committed. But, finally, the guilt of both defendants could be predicated on inferences which could be drawn from their unlawful possession of the weapons found in the apartment.

Thus, when the jury found the defendant Young guilty along with the defendant Chin at the second trial, it did so on the same evidence which another jury had acquitted her of (the conspiracy count) and on which it had otherwise failed to agree.

The standard of the "same evidence" was definitively discussed in Sealfon v. United States, 332 U.S. 575 (1948). Sealfon holds with the general rule that a person may be tried and convicted for both conspiracy and a substantive offense -- that they are separate and distinct offenses. Cf. Pierera v. United States, 347 U.S. 1 (1954), which puts a further gloss on that rule.

In Sealfon, the defendant was tried first on a conspiracy charge to defraud the government in a scheme to file a false invoice concerning a sugar rationing law. After the

defendant's acquittal on the conspiracy charge, he was tried on the substantive offense of uttering the false invoices. The issue there -- similar to the one in the case at bar -- was "whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction."

Said the court there, with particular applicability to the case at bar:

> "The instructions under which the verdict was rendered, however, must be set in a practical frame and reviewed with an eye to all the circumstances of the proceedings. . . . So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts of each trial were identical. . . . Thus, the core of the prosecutor's case was in each case the same. . . . There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement. . . . It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do." (322 U.S. 579, 580)

Recently, the Eighth Circuit had made a similar holding in United States v. Schaeffer, 510 F.2d 1307, 1313 (8 Cir. 1975) cert. den. 95 S.Ct. 1975, 1980. See United States v. Cohen, 197 F.2d 27 (3 Cir. 1952).

Finally, Judge Friendly, in United States v. Sabella, 272 F.2d 206, 212 (2 Cir. 1959) developed for this Circuit a rationale for the proscription of successive prosecutions on successive indictments even though under a different law:

> "The Fifth Amendment guarantees that when the government has proceeded to judgment on a

certain fact situation there can be no further prosecution of that fact situation alone. The defendant may not later be tried again on that same fact situation, where no significant additional fact need be proved, even though he may be charged under a different statute. He may not again be compelled to endure the ordeal of criminal prosecution and the stigma of conviction. These are the plain and well understood commands of the Fifth Amendment in forbidding double jeopardy. Here there was one sale of narcotics. The government should have but one opportunity to prosecute on that transaction. Although in such a prosecution it may join other charges based on the same fact situation it may not have a succession of trials. . . ."

POINT III

THE COURT BELOW ERRED IN FORECLOSING DEFENSE TESTIMONY ON DEFENDANT YOUNG'S STATE OF MIND WHICH WAS RELEVANT TO THE ISSUE OF RESIDENCY AND, ACCORDINGLY, RELEVANT TO THE ISSUE OF GUILT OR INNOCENCE.

At the first trial Judge Mishler permitted defense counsel for defendant Young to make inquiry of Charles Young, the defendant's father, concerning her return to California in July, 1975. The father's testimony supported defendant Young's theory of the case, that she had changed her residence in July, 1975 when she had a quarrel with co-defendant Chin, with whom she lived in New York, but to whom she was not yet married. She told her father, and he reported the conversation to the first jury that she had broken up "with Kenny", had come to California on a one-way ticket for the purpose of relocating and finding

a job (Trial I, 340, 352).[12]

At the second trial, Judge Mishler refused to permit Mr. Young's testimony about what his daughter told him on her return to California -- instead the judge only permitted the conclusion (in the form of a "leading question") that she had come "to California to establish her residence" (Trial II, 502, 503) -- a statement which could well have sounded untrue to the jury, couched as it was in terms of legal conclusion rather than in a mode a daughter would express herself to her father.[13] Moreover, even when the issue of her residency and what she actually said to her father was the subject of cross-examination, the court adhered to its original ruling and refused to permit defense counsel to establish what was actually said (Trial II, 521, 524, 525).

Defendant Young offered the testimony, which was hearsay and accepted over objection by Judge Mishler at the first trial, to show the state of mind defendant Young on her return to

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12. Defendant Young contends in Point II, supra, that the jury found that this was a fact when it acquitted her of any conspiracy with co-defendant Chin to deal in the weapons involved as charged in the first indictment, Count I, and so relitigation of this issue was barred by the doctrine of collateral estoppel.

13. At both trials, defendant Young advanced an alternative position that she continued her residence with her family at all times in California as a dual residence. At the first trial, she showed the continuing receipt of mail at her parents' residence (Trial I, 346). At the second trial, Mr. Young testified that under Chinese custom an unmarried daughter's residence is always with her parents (Trial II, 516, 517). The trial court rejected this proposition at both trials on the grounds that the statute referring to residence really means domicile. See Point IV, infra.

California (Trial I, 340, 341). Nonetheless, it was rejected at the second trial for no apparent reason (Trial II, 499-500, 525).

This Court has held similar testimony which reveals the state of mind of the speaker to be admissible. See Scholle v. Cuban-Venezuelan Oil Voting Trust, 285 F.2d 318, 321 (2 Cir., 1960):

> "The statements should have been admitted under the 'state of mind' exception to the hearsay rule to establish the truth of what was said and should have also been admitted to prove circumstantially . . . [what the speaker intended]
>
> . . . . .
>
> ". . . the hearsay rule does not bar admission of the statements used circumstantially since when so used the primary focus of inquiry is whatever inferences can be drawn from the fact the words were spoken and not the truth of what was said."

Cf. Pauling v. News Syndicate, 335 F.2d 659, 664 (2 Cir., 1964); McCormack, Evidence, §268; Richardson, Evidence, §211.

Had the jury heard the father report the words he remembered his daughter say (that she had broken up with Kenny and returned to California to live), it could well have believed that testimony. As it stood at the second trial, the father's testimony was made unbelievable by the court's requirement that he say that she came to California to establish her residence (Trial II, 503).

If the jury had believed the father, it could easily have taken the next step and determined that the purchase in

July, 1975 of the AR 180 at Coles Sporting Goods Store was made rightfully by a bona fide California resident who later moved the rifle to New York with her other property, either (1) as a resident of both California and New York (see Point IV, infra), or (2) in a change of residence back from California to New York.

POINT IV

THE COURT BELOW ERRED IN INSTRUCTING THE JURY THAT RESIDENCE AS USED IN A CRIMINAL STATUTE (18 U.S.C. §922) IS DEFINED AS "DOMICILE" WHERE CONGRESS USED THE TERM RESIDENCE ONLY.

The pertinent sections of the statute involved read:

"§922
(a) It shall be unlawful

. . . . .

(3) for any person [other than a licensed importer, etc.] to transport into or receive in the State where he resides any firearm purchased outside the State. . . ."

In 1968, Congress declared as its purpose in passing the law that

> "The Congress hereby declares that the purpose of this title . . . is to provide support to Federal, State and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes. . . ."
> (See 18 U.S.C. §921, Pocket Part 1976, p. 235)

In order to further implement the Act, the Department of the Treasury (Bureau of Alcohol, Tobacco and Firearms) issued its own official interpretation of the meaning of the law for the reading and understanding of citizens affected by it in "Gun Control Act, Questions and Answers" [Pub. No. ATF P 7580.1 (5-74)].

Relevant sections interpreting the Act read as follows:

> "(25) May a non-licensee transport firearms interstate for sporting purposes?
>
> Generally yes. However, the Gun Control Act makes it unlawful for certain persons, such as felons, to engage in the interstate transportation of any firearms or ammunition. [p. 7, A-57]
>
> "(26) Is there a Federal Permit which allows an individual to take his personal firearms into another state or carry them locally?
>
> No. Any requirement in this area is the responsibility of State and local authorities. (Pub. 712) [p. 7, A-57]
>
> . . . . . .
>
> "(29) What constitutes residency in a State?
>
> The state of residency is the State in which an individual regularly resides or maintains his home. . . . [p. 8, A-57]
>
> "(30) Can a person who resides in one State and own property in another State purchase a firearm in either State?
>
> If the person maintains a home in both states and resides in both states for certain periods of the year, he may, while residing in each particular state, purchase a firearm in that state . . . [p. 8, A-57]
>
> . . . . . .
>
> "(32) Can a person who is relocating out of state move his firearm with other household goods?
>
> Yes, he may transport Title I firearms if he is not prohibited by [provisions not relevant here] [p. 8, A-57]."

It is clear from a reading of these sections that the

law contemplates a person having more than one residence; that a person who has more than one residence may move his rifle or weapon along with other effects between residences and particularly may do so for hunting purposes.

The court in equating residence with "domicile" effectively read out of the law what it clearly meant.

The distinction between domicile and residence is often significant in the law. A recent case in this Circuit involved this issue. In Corwin v. Interpublic Group of Companies, Inc., 512 F.2d 605, 610 (2 Cir., 1975), this Court noted that for purposes of a tax statute designed to benefit creditors, the congressional choice of the word "residence" rather than "domicile" should be respected -- that the two words do have a different meaning and the difference can be significant.

> ". . . every person has at all times one and only one domicile for the same purpose . . . while a person can have more than one residence."

Also see Reese and Green, "That Elusive Word 'Residence'", 6 Vanderbilt L. R. 561 (1953).

Defendant Young's conduct -- assuming her transportation of the rifle from California to New York -- was in all respects within the law. This is clear from the language used by Congress, i.e. "residence", the preamble and statement of purpose of the law -- that it was not aimed against hunters and other persons lawfully possessing weapons -- and the interpretation given the section by the Department of the Treasury.

The jury, however, was not permitted to construe residency as Congress expressly intended, nor was it given the right to consider Congressional intent concerning hunting, see Point V, infra.

Defendant Young brought this to the court's attention by excepting to the charge (Trial II, 823; A-129) and by requesting instruction on the residency issue indicating the relevant portions of the Department of the Treasury handbook (A-56-58).

Assuming, however, arguendo, that the statute was ambiguous, the gratuitous and narrow construction of the law given the jury by Judge Mishler in substituting "domicile" for "residence" was in conflict with the time-honored rule of lenity to be applied in criminal cases. Said Justice Frankfurter for the Supreme Court in Bell v. United States, 349 U.S. 81, 83 (1955):

> "When Congress leaves to the Judiciary the task of imputing to Congress an undecided will, the ambiguity should be resolved in favor of lenity."

Also see Bewis v. United States, 401 U.S. 808, 812 (1971); United States v. Feola, 420 U.S. 671, (dissent Stewart, J., p. 712) (1975).

POINT V

SINCE CONGRESS EXPRESSLY STATED THAT IT DID NOT INTEND TO MAKE CRIMINAL THE POSSESSION OR TRANSPORTATION OF FIREARMS BY BONA FIDE HUNTERS, AND SINCE EVIDENCE WAS PROPERLY BEFORE THE JURY THAT DEFENDANTS WERE OF GOOD CHARACTER AND HUNTERS, IT WAS ERROR TO INSTRUCT THE JURY THAT HUNTING WAS IRRELEVANT AND TO FORBID COUNSEL FROM MENTIONING GOOD CHARACTER OR HUNTING ON SUMMATION.

As set forth in Point IV, supra, Congress made clear in its preamble to the Omnibus Crime and Safe Streets Act of 1968 that its purpose was to fight crime -- and the provisions of the law were aimed at the "criminal element" in society -- not law-abiding citizens and legitimate hunters. This was called to the court's attention by the submission of a proposed instruction (A-55) which was denied.

The government itself adduced evidence that the defendants were law-abiding citizens in that they paid their bills promptly and made legal application for gun permits, etc. The government produced witnesses who attested to Defendant Young being a hunter and making application for a rifle permit which included a declaration of good character.

Nonetheless, the court excluded all mention of both and threatened to hold defense counsel in contempt for mentioning these relevant facts in her summation (Trial II, 677-680).

Initially the government referred to the weapons involved before the jury as "military" weapons (Trial II, 6, 7). This reference which imports a lethal intent to ownership of the weapons involved was not anywhere documented or supported by the evidence.

The rifle purchased by defendant Young in California in July, 1975 was purchased in a store which sold mostly "hunting equipment" (Trial II, 134). Martin Benedicto testified for the government that he was formerly the proprietor of a shop in the "heart of the hunting country" in upper New York State (Trial II, 290), and it was there he had a conversation with defendant Young about hunting and the kind of weapon she preferred or wanted to buy from him for small game (Trial II, 289).

The government went to great lengths to show how the defendants paid their bills -- and promptly (Trial II, 320), 347, 402-406); and further that applications were made to comply with local law concerning possession of hunting firearms (Trial II, 366, 373, 374). Evidence was received that written applications were made for both defendants reflecting their good character (Trial II, 374-378, 420-423, 427).

The curtailment of defense counsel's summation and the sharp limitation on what she could say on the subject of law-abiding and hunting -- both in the record below -- in effect prevented any comment on the evidence, was clear error (Trial II, 17, 137, 286, 290-303, 677-680).

The United States Supreme Court has recently emphasized the right of a defendant to have his attorney sum up. Herring v. New York, 422 U.S. 853 (1976). Although counsel is confined to comment on the evidence admitted and the inferences to be drawn therefrom, it is nonetheless part of that right that counsel be permitted such argument. United States v. Bell, 506 F.2d 207

(C.A.D.C., 1974). The limitation should not be narrowly drawn. See United States v. Lawson, 483 F.2d 535 (8 Cir., 1974), cert. den. 414 U.S. 1133; United States v. Mulcherino, 311 F.2d 172 (4 Cir., 1962). Said the Court of Appeals for the District of Columbia in United States v. DeLoach, 504 F.2d 185 (C.A.D.C., 1974):

> "The trial court has broad discretion in controlling the scope of closing argument. That discretion is abused, however, if the court prevents defense counsel from making a point essential to the defense.
>
> . . . . .
>
> "The prosecutor and the defense counsel in turn must be afforded a full opportunity to advance their competing interpretations . . ."

POINT VI

DEFENDANT YOUNG JOINS IN ANY POINT MADE BY CO-DEFENDANT CHIN APPLICABLE TO HER CASE BUT NOT SET FORTH HERE.

CONCLUSION

The judgment of conviction of Elizabeth Jane Young Chin should be reversed.

Respectfully submitted,

ELEANOR JACKSON PIEL

Attorney for Defendant-Appellant
Elizabeth Jane Young Chin

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket
~~Index~~ No. : 76-1420

UNITED STATES OF AMERICA,

Appellee, ~~Plaintiff~~

against

KENNETH RAYMOND CHIN, and ELIZABETH JANE YOUNG, now known as ELIZABETH JANE YOUNG CHIN,

*Defendant*s-Appellants.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 101 West 80th St., New York, N.Y. 10024.

That on December 15, *1976 deponent served the annexed*

BRIEF FOR APPELLANT ELIZABETH JANE YOUNG CHIN

on David G. Trager, U.S. Attorney Eastern District of N.Y.

attorney(s) for Appellee

in this action at 225 Cadman Plaza East, Brooklyn, N.Y. 11201

the address designated by said attorney(s) for that purpose by depositing 2 *true copies of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

Sworn to before me

this 15th day of December, 1976.

August De Fonse

The name signed must be printed beneath

AUGUST DE FONSE

GEORGE COHEN
Notary Public, State of New York
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1977